

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL VANCE,

Defendant-Appellant.

UNPUBLISHED

January 13, 2004

No. 244072

Kent Circuit Court

LC No. 02-000484-FH

Before: Donofrio, PJ., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for felonious assault, MCL 750.82. Defendant was sentenced to four to fifteen years' imprisonment. On appeal, defendant argues the trial court erred when it refused to grant defendant a new trial due to the underrepresentation of minorities in the prospective jury panel due to a computer glitch in the selection process, as well as ineffective assistance of counsel. Because the record does not support either of defendant's claims on appeal, we affirm.

On January 1, 2002 defendant was arrested after police responded to an anonymous 911 call reporting that three men were dragging a woman by her hair outside of an apartment building on New Year's Eve. When the police arrived at the apartment building, they heard a woman crying and a man yelling coming from the second floor of the building. After pinpointing the origin of the sounds, they knocked and announced their presence at apartment 207. Defendant's brother, James Vance, opened the door. Another man was sitting in the living room of the apartment. James Vance told the officers that there had been an argument but everything was alright. The police heard the female complainant crying in the bathroom and told her to come out. When she did not come out, the police eventually kicked the bathroom door in and found the complainant and defendant inside the bathroom. The complainant was crying, shaking, vomiting, her hair was messy, and her blouse was torn. The police observed swelling on the left side of complainant's head and swelling near her buttocks.

The complainant testified that defendant had been her boyfriend for six months. She went to defendant's brother James Vance's apartment on New Year's Eve. When she arrived defendant was drinking and was angry because he believed she had written down some phone numbers. Both James Vance and his son Deandre were in the apartment. The argument between the complainant and defendant became physical after defendant accused the complainant of sleeping with his brother. Defendant slapped her with an open hand causing her to fall to the

floor and also hit her twice on the side of her head with a closed fist. When she attempted to leave the apartment to escape, defendant followed her outside and dragged her back into the apartment.

Once back in the apartment defendant got a knife from the kitchen and threatened his brother with it. He then swung the knife around, and it hit the complainant's coat leaving a mark. As she was sitting on the couch in the apartment defendant came at her with the knife. Defendant called the complainant a bitch, said he no longer wanted to see her, and threatened to kill her. Defendant held the knife for approximately twenty minutes before returning it to the kitchen. The argument then continued in the bathroom where defendant again hit the complainant.

Defendant first argues on appeal that the trial court erred when it did not grant his motion for a new trial based on his contention that minorities were underrepresented in the prospective jury due to a computer glitch. We disagree. We review a trial court's ruling on a motion for a new trial for an abuse of discretion, and a trial court's findings of fact for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

Defendant specifically argues that he was denied his constitutional right to a jury drawn from a venire representative of a fair cross section of the community because of a computer "glitch" in the Kent County juror selection system. Defendant failed to preserve his challenges to the venire and the jury selection process because he did not object to the jury array before the jury was impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996). Therefore, defendant forfeited appellate consideration of the issue. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Defendant's reliance on *Hubbard* is misplaced. In *Hubbard*, unlike this case, defense counsel made an objection to the jury array before the jury panel was sworn. *Hubbard, supra* at 465. Here, defense counsel failed to object to the jury array or panel and thus any alleged error is forfeited.

Defendant next argues that he was denied the effective assistance of counsel at trial. Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While we review a trial court's findings of fact for clear error, we review questions of constitutional law de novo. *Id.* In order for a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303.

Defendant contends that he was denied the effective assistance of counsel when defense counsel (1) advised him that if he testified he could be impeached with his prior convictions although his convictions were either more than ten years old, or clearly did not involve a crime of dishonesty, false statement, or theft and could not be used to impeach him; (2) failed to adequately impeach the complainant with her prior mental history and history of combativeness;

and (3) did not have time to sufficiently prepare for trial and did not locate a potential witness, Tammi Moore.

Defendant's first complaint is that he did not testify based on errant advice from his trial counsel. Defendant provided an affidavit to the lower court in support of his motion for a new trial. In this affidavit, defendant stated that he did not assault the complainant with a dangerous weapon. On appeal, defendant argues that he would have testified in accordance with this statement at trial had he not been misinformed by his defense counsel. Although we find that defense counsel's advice was given in error, defendant has provided us with no evidence or argument affirmatively demonstrating a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *Toma, supra*, 462 Mich 302-303. To the contrary, our review of the record reveals that defendant's brother, who was present at the time of the incident, testified on behalf of defendant. Defendant's brother provided a version of the events in the light most favorable to defendant before the jury at trial. Having defendant's brother testify in this manner only aided the defense because it allowed defendant to present his version of the facts, yet shielded himself from exposure to cross-examination. Despite counsel's error, we do not find that but for counsel's errors, the result of the proceeding would have been different. *Id.*

Defendant next argues that he was denied the effective assistance of counsel when his counsel failed to adequately impeach the complainant with her prior mental history and history of combativeness. Decisions regarding the choice and presentation of evidence and the calling or questioning of witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In general, this Court will not second-guess a counsel's judgment on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defense counsel extensively cross-examined the complainant at trial and elicited testimony from her regarding mental health issues. In fact, the complainant admitted during cross-examination that she had been prescribed medication for anger management but refused to take it. We do not find that defense counsel was ineffective. Counsel did question the complainant regarding her mental history and we decline to second-guess defense counsel on this matter of trial strategy.

Finally, defendant argues that his counsel did not have time to sufficiently prepare for trial because he was appointed one week prior to trial, and for this reason, counsel did not locate a potential witness named Tammi Moore. Aside from his contention that defense counsel was ineffective for not locating Tammi Moore, defendant does not assign any other errors resulting from defense counsel's substitution. Again, decisions regarding the calling or questioning of witnesses are presumed to be matters of trial strategy. *Rockey, supra*, 237 Mich App 76. Defendant has not provided us with an affidavit from Tammi Moore describing her potential testimony. In his affidavit, defendant avers that Tammi Moore "would have testified as to the complainant's propensity for argumentativeness and violence." We fail to see how this testimony would have aided defendant since he did not claim he acted in self-defense, and thus, defendant has not shown prejudice. Defense counsel was not ineffective for not locating Tammi Moore.

Since defendant was not denied the effective assistance of counsel at trial, the trial court did not err when it denied defendant's motion for a new trial.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Griffin
/s/ Kathleen Jansen